IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO POULTRY DEFENDANTS' JOINT MOTION IN LIMINE TO PRECLUDE OPINION TESTIMONY BY NON-RETAINED EXPERTS (Dkt. #2435)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF (PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO POULTRY DEFENDANTS' JOINT MOTION IN LIMINE TO PRECLUDE OPINION TESTIMONY BY NON-RETAINED EXPERTS (Dkt. #2435)

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("State"), and respectfully responds in opposition to Poultry Defendants' Joint Motion in Limine to Preclude Opinion Testimony by Non-Retained Experts (Dkt. #2435) ("Motion in Limine") as follows:

I. Introduction and Background

Through their Motion in Limine, Defendants seek to preclude all or part of the opinion testimony of four witnesses designated by the State as non-retained experts, Dr. Indrajeet Chaubey, Dr. Tommy Daniel, Dr. Brian Haggard and Mr. Derichsweiler. Dkt. #2435. However, Defendants have provided the Court with no valid basis to preclude the opinions of these eminently qualified expert witnesses.

In broad terms, Defendants' Motion is primarily based on two Rules of Evidence, Fed. R. Evid. 701 and Fed. R. Evid. 702. First, Defendants claim Drs. Chaubey, Daniel

and Haggard and Mr. Derichsweiler are non-disclosed experts and, thus, cannot give "lay opinions" under Rule 701 of the Federal Rules of Evidence. However, it has long been clear to Defendants that Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler were not offered as mere lay witnesses, but as expert witnesses. Indeed, on April 1, 2008, the State served on Defendants, a list containing: ". . . the names of people, though not retained or specially employed by the State to provide expert testimony in this case, who may offer **opinions based upon scientific, technical, or other specialized knowledge, skill, experience, training or education."** Dkt. #2258-2 (4/1/08 Expert Witness Letter at 2) (emphasis added). Included in this non-retained expert list were Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler and a short description of their expertise. *Id.* at 3-5. Thus, because Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler are not being offered as lay witnesses, Defendants' Rule 701 arguments are a red herring and provide no basis to preclude the testimony of <u>any</u> of the State's non-retained experts.

Defendants' Rule 702 arguments should be disregarded in their entirety as they are untimely and otherwise inappropriate. The Court-ordered deadline for "*Daubert*" Motions was May 18, 2009. *See* Dkt. ##2003, 2026, 2049. Defendants filed seven (7) *Daubert* motions by the May 18 deadline, but Defendants did not seek to exclude any of these witnesses as part of those *Daubert* motions. Instead, Defendants filed the present Motion in Limine on August 5, 2009, well over two (2) months after the *Daubert* motion deadline. The Motion in Limine, while not specifically citing *Daubert*, is, nonetheless, a *Daubert* motion in disguise. After all, a court's role in deciding *Daubert* motions is that of "gatekeeper" under Rule 702. Defendants should not be permitted to evade the

Court's deadline and cause prejudice to the State with their eleventh hour Rule 702 challenges.

Nevertheless, even should the Court decide to consider Defendants' Rule 702 arguments, the opinions of Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler should still be admitted. All of these witnesses are eminently qualified,[1] and their opinion testimony is relevant and well-supported. For instance, Dr. Chaubey is a truly independent expert in this case. He has not been paid by either side, has not been asked to conduct any work specifically in connection with this litigation and has not been asked to bolster the credibility of any of the retained experts. He has, however, given opinion testimony that is harmful to Defendants' case. As an illustration and without limitation, Dr. Chaubey has testified that: (a) "there will always be some losses taking place from the areas . . . treated with the poultry waste"; and (b) "Poultry litter is the biggest source of nutrients [in the IRW] when you look at all the sources, and given that fact and given the fact that it runs off the fields, it will be logical to conclude that significant amount of phosphorus in the [Illinois] river is coming from the areas that are treated with poultry litter." Ex. 1 (Chaubey Depo. at 168, 163-64) (emphasis added). Dr. Chaubey has also testified that: the primary method of disposal of poultry waste is land application; high STP levels are indicative of application of poultry waste in excess of agronomic need; and poultry waste is the dominant source of phosphorus in the watershed. *Id.* at 32-33; 74-75 & 175-76.

Dr. Chaubey is eminently qualified. Dr. Chaubey earned his Ph.D. in biosystems engineering from Oklahoma State University. Ex. 1 (Chaubey Depo. at 15-16). He is

[1] Defendants do not challenge the qualifications of Mr. Derichsweiler, but argue that his opinions are not sufficiently tied to the facts of this case. Motion at 19.

currently a tenured professor at Purdue University. *Id.* at 23-24. For over fifteen years, Dr. Chaubey's primary area of study and research has been runoff (including poultry waste) and transport processes in agricultural watersheds and their effect on water quality. *Id.* at 21-24. In 2007, Dr. Chaubey was awarded the New Holland Young Researcher Award, which is given annually by the American Society of Agricultural and Biological Engineering to one researcher younger than 40 years old. *Id.* at 16. Dr. Chaubey has received numerous other awards, including the Outstanding Researcher Award from the University of Arkansas's Department of Biological and Agricultural Engineering. Ex. 2 (Chaubey C.V. (Depo. Ex. 1)). Dr. Chaubey is widely published in peer-reviewed journals on topics such as nutrient releases, watershed modeling and poultry litter management. *See* Ex. 3 (List of Chaubey Publications (Depo. Ex. 2)).

Defendants argue that Dr. Chaubey's opinions are not sufficiently tied to the facts of this case. This argument lacks credibility. Pertinently, during his many years at the University of Arkansas and beyond, Dr. Chaubey has extensively researched water quality issues in the IRW. Ex. 1 (Chaubey Depo. at 24-28). For instance, Dr. Chaubey is the lead researcher in the ongoing "Moores Creek" study. Moores Creek (also known as "Lincoln Lake Watershed") is a sub-watershed within the IRW. Ex. 1 (Chaubey Depo. at 20). The Moores Creek study involved the collection of water quality data from the area and assessment of whether, and to what extent, the implementation of poultry waste best management practices has improved water quality. *Id.* at 39. With the aid of significant public funding, Dr. Chaubey and his team conducted automated water quality sampling and monitoring from 2001 through 2005. Ex. 4 (Lincoln Lake "Final Report" (Depo. Ex. 3) at 2-3). As part of compiling a "Final Report" for the Moores Creek study, Dr.

Chaubey cited prior peer-reviewed studies of the area in concluding that : **"**[s]ources of NPS [or nonpoint source pollution] in the Ozark Highlands of Northwest Arkansas have been linked to agricultural activities in the area"; and "[e]xcessive land application of animal manure in the watershed had led to degradation of surface water and ground water due to runoff losses of N and P, and pathogens . . ." Ex. 4 (Lincoln Lake "Final Report" (Depo. Ex. 3) at 1-2).

Dr. Chaubey was also part of the team from the University of Arkansas that compiled a phosphorus mass balance computation for the Illinois River. Ex. 1 (Chaubey Depo. at 50-51). Dr. Chaubey has explained a "mass balance" as being "similar to balancing your checkbook, what comes in and what goes out [and] the difference is how much gets accumulated." *Id.* at 50. With the Illinois River mass balance, Dr. Chaubey and his team were conducting this same type of balancing "in the context of nutrients, how much nutrients are getting in the watershed, how much are getting out and then what gets accumulated." *Id.*

In conducting the Illinois River mass balance, Dr. Chaubey and his team utilized several sources of data:

> Water quality data came from Arkansas Water Resources Center and Dr. Marc Nelson, and then we looked at USDA agricultural statistics reports. We looked at fertilizer sale data in the two counties where this watershed is located in Arkansas. So there were a number of different sources. Some of the point source data came directly from the municipalities that have got the best water treatment plants in the watershed.

Ex. 1 (Chaubey Depo. at 52). An early draft of the Illinois River phosphorus mass balance actually broke phosphorus input sources (by pounds) into percentages and showed that animal waste constitutes 91.9% of all non-point source phosphorus loading in the IRW, with poultry waste being far and away the most significant source of

phosphorus loading in the watershed. Ex. 5 ("Illinois River Phosphorus Mass Balance Computation" Draft (Depo. Ex. 15) at ADEQ 2007 00917); Ex. 1 (Chaubey Depo. at 52-3). The final Illinois River mass balance report contains similar data, except the phosphorus inputs are reported in kilograms rather than pounds and there is no percentage computation. Ex. 6 (Illinois River Mass Balance (2002) (Depo. Ex. 8) at 6).

Clearly, Dr. Chaubey is qualified to give opinion testimony in this case. His scientific, technical, and other specialized knowledge, skill, experience, training and education regarding nutrient transport and nonpoint source pollution is undeniable. Further, his *specific* expertise makes his opinions all the more helpful to the trier of fact. Because much of Dr. Chaubey's research has been done in the IRW -- such as the Moores Creek study and the Illinois River mass balance -- such research is demonstrably relevant.

While Dr. Chaubey's research in the IRW is clearly admissible, Defendants are specifically critical of Dr. Chaubey's testimony concerning other watersheds. However, Dr. Chaubey's research in other watersheds is also relevant and admissible to the extent that it involves more fundamental and universal scientific processes that would apply to the IRW. For instance, Dr. Chaubey conducted a study of Beaver Lake which is also in Northwest Arkansas and actually abuts the IRW. Ex. 1 (Chaubey Depo. at 169). The Beaver Lake study looked at "how much nitrogen and phosphorus was coming from different land use areas in the basin and how do they compare against each other." *Id.* at 169; *see also* Ex. 7 (Beaver Lake Study Report (Depo. Ex. 6)). As part of the Beaver Lake study, Dr. Chaubey found "exponential[]" increases in phosphorus transport with increases in pastureland use. *Id.* at 170-75. As Dr. Chaubey explained -- under cross-

examination by counsel for Defendants -- the general conclusions from the Beaver Lake study are useful in making conclusions about runoff processes in the IRW:

> Q. Is it your intention to offer to the court any opinions regarding the Illinois River watershed based on the conclusions reached here regarding Beaver Lake?
>
> ***
>
> A. My intention is to offer opinions about how -- these agricultural watersheds we have and specifically the watersheds that may be in the similar physiographic regions with similar hydrologic, geologic soil characteristics.
>
> Q. So you do intend to opine that because you see certain things happening in Beaver Lake, that might be also applied in the Illinois River watershed?
>
> ***
>
> A. Some of the processes will be similar.
>
> Q. And what processes are you referring to?
>
> A. I am talking about rainfall runoff processes. I am talking about how different land use activities respond to hydrology and water quality.
>
> Q. And those processes can vary a tremendous amount across one basin; is that not correct?
>
> ***
>
> A. It depends upon what your question is, what you are looking at. It can vary spatially and temporally, but if you look at -- it depends upon the scale of your analysis and what scale you are looking at.
>
> Q. And what was the scale of the Beaver Lake study?
>
> A. I believe we looked at all major tributaries here. So except some of the minor areas here on the top, it included all the major tributaries that are contributing flow to the Beaver Lake.
>
> ***
>
> Q. . . . And so the conclusions that you reach in this study are general in nature because they refer to processes across a large basin?
>
> ***

> A. That is correct.
>
> Q. And this [Beaver Lake study] is not a site specific survey -- study…?
>
> ***
>
> A. Again, it depends upon how you look at it because lots of these studies are site specific studies. Why scientifically we try to do there is take general conclusions that could be applicable to other watersheds and similar conditions . . .
>
> ***
>
> . . . There will be the, you know, outliers. There will be variability in the data, but if you look at the general behavior of these basins, those general behaviors are applicable.

Ex. 1 (Chaubey Depo. at 245-48). It is perfectly reasonable and acceptable for Dr. Chaubey to draw upon all of his relevant experience and knowledge in arriving at opinions about the IRW. And as Dr. Chaubey logically explained, where rainfall runoff processes are similar between watersheds, a study from one watershed can inform opinions about the other watershed.

In sum, Dr. Chaubey is highly qualified to opine about nutrient loading, runoff and water quality issues in this case. And his opinions are pertinent, well-supported and otherwise admissible over the objections of Defendants. Additionally, as shown below, Dr. Daniel's, Dr. Haggard's and Mr. Derichsweiler's opinions are also admissible. The Motion in Limine Should be denied.

II. Argument

A. Non-Retained Experts Generally

Under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, a written expert report must be prepared and signed by "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party

regularly involve giving expert testimony." The 1993 Advisory Committee Notes provide additional guidance:

> The requirement of a written report in paragraph (2)(B)…applies **only** to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

(emphasis added).

It is well-established in the federal courts that such "non-retained" experts are not required to submit expert reports. *See, e.g., B.H. v. Gold Fields Mining Corporation,* 2007 WL 128224, *2 (N.D. Okla. January 11, 2007); *Voda v. Cordis Corporation,* 506 F.Supp.2d 868, 880 (W.D. Okla. 2007); and *ICE Corporation v. Hamilton Sunstrand Corporation,* 2007 WL 1652056, *5 (D. Kan. June 6, 2007); *Bell v. Illinois Cent. R.R. Co.,* 2006 WL 3841544, *2-3 (S.D. Ill. Dec.14, 2006); *Williams v. Asplundh Tree Expert Co.,* 2006 WL 2868923, *7 (M.D. Fla. Oct.6, 2006).

Chief Judge Eagan's Opinion and Order on a motion to exclude in *B.H. v. Gold Fields Mining Corporation,* 2007 WL 128224 (N.D. Okla. January 11, 2007), provides a pertinent and detailed analysis of the retained versus "non-retained" expert question. The subject motion to exclude in *B.H.* involved Dr. Robert Lynch, a professor of environmental science at the University of Oklahoma.

There, the defendants moved to exclude Dr. Lynch for failure to provide a written report, arguing that Dr. Lynch was "retained" to provide expert testimony, "in that he ha[d] no knowledge of the facts of the underlying cases, and ha[d] been asked by Plaintiffs' counsel to provide testimony that falls within Rule 702." *B.H.,* 2007 WL

128224 at *1. In denying the motion to exclude, Judge Eagan held and reasoned as follows:

- "Although evidence that a party was not paid to testify suggests he was not retained, this fact alone is not dispositive of the issue. *Brown v. Best Foods,* 169 F.R.D. 385, 388 n. 3 (N.D.Ala. 1996)."

- "A key factor in the Court's consideration is how plaintiffs' counsel initially formed a relationship with the witness, such as whether the witness was asked to reach an opinion in connection with specific litigation. *Kirkham v. Societe Air France,* 236 F.R.D. 9, 12 (D.D.C. 2006)."

- "Defendants have presented no evidence that Dr. Lynch routinely provides expert services as part of his work or that he reached any opinion ***specifically in connection with this litigation.*** *Prieto v. Malgor,* 361 F.3d 1313, 1318-19 (11th Cir. 2004)."

- Dr. Lynch "began his [pertinent] research . . . almost 8 years [be]for[e] th[e] [*B.H.*] case was filed."

- Dr. Lynch "has not received any compensation for giving an opinion in this case, nor does it appear that he will be paid for testifying at trial."

- "Although Dr. Lynch's opinions may be harmful to defendants, he has not been asked to testify to support the credibility of plaintiffs' retained experts, as [the expert] was in *Herd* [*v. Asarco, Inc.,* 01-CV-0891-SEH-PJC (N.D. Okla.)]."

- "In summary, there is no basis for the Court to conclude, from the nature of Dr. Lynch's proposed testimony or the circumstances leading to his identification on plaintiffs' preliminary witness list, that he was "retained or specially employed" to testify as an expert in this case."

B.H., 2007 WL 128224, *3-4 (emphasis added).

Defendants do not argue that Dr. Daniel, Dr. Haggard or Mr. Derichsweiler would not qualify as non-retained experts under this standard. Defendants do, however, argue that Dr. Chaubey was required to provide a Rule 26 report because "designated portions of Dr. Chaubey's deposition include new opinions formed during and as part of this litigation which are not included in Dr. Chaubey's previously published articles." Motion

in Limine at 20. However, Dr. Chaubey easily qualifies as a non-retained expert under Rule 26(a)(2)(B).

First, Dr. Chaubey has not been paid by either side to testify in this case. Ex. 1 (Chaubey Depo at 8). Further, the State has not requested that Dr. Chaubey arrive at any opinion specially for the purpose of this case, but has merely called upon his scientific expertise gained outside the confines of this litigation. *Id.* Dr. Chaubey began his pertinent research years before this litigation was brought. During his deposition, Dr. Chaubey gave extensive testimony proving that all of the opinions given in this case are derived from his own study and research -- completely independent of this litigation. *Id.* at 7-13. Indeed, Dr. Chaubey has never seen the Complaint in this case, does not know who all the Defendants are, has not read any of the expert reports, has not read any of the deposition transcripts and has never performed any consulting work for the State or Defendants. *Id.* Further, Dr. Chaubey has not been asked to testify as to the credibility of any of the State's retained experts.

Defendants claim Dr. Chaubey has improperly given new opinions that are not based upon his pre-litigation research and study. Motion in Limine at 20-22. However, because Dr. Chaubey has conducted no work specific to this litigation, it is simply not possible that Dr. Chaubey's opinions could be based on anything other than his pre-litigation research and study. As demonstrated *supra*, Dr. Chaubey brings a wealth of pertinent scientific and specialized knowledge, skill, experience, training and education to the table which he obtained completely separate and apart from this litigation.

Defendants make an unfortunate attempt to call Dr. Chaubey's credibility into question because he happens to be a "colleague" of one the State's retained experts, Dr.

Engel. Motion in Limine at 21. However, as Dr. Chaubey testified, Dr. Engel neither encouraged nor discouraged him to testify in this case. Ex. 1 (Chaubey Depo. at 12). Dr. Chaubey's interest in testifying in this case is purely professional, that is, to provide the Court with the benefit of his expertise. *Id.* at 204. In sum, Dr. Chaubey is a non-retained expert under Rule 26(a)(2)(B) and was not required to provide an expert report.

B. Rule 701 Provides No Basis to Preclude the Testimony of Drs. Chaubey, Daniel and Haggard or Mr. Derichsweiler

Defendants also argue in their Motion that the opinions of Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler are inadmissible under Fed. R. Ev. 701. Motion at 5-7. However, because Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler[2] are being offered as non-retained ***expert*** witnesses, Rule 701 is inapplicable on its face. Thus, Rule 701 provides no basis to preclude any of the non-retained expert opinions at issue.

Rule 701 provides that:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge...."

(emphasis added). Because Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler are testifying as experts in this case, Rule 701 simply has no bearing on the admissibility of their testimony.

The sole case relied upon by Defendants in support of their Rule 701 argument -- *Bank of China v. NBM LLC.,* 359 F.3d 171 (2d. Cir. 2004) -- is similarly inapposite. In

[2] It should be noted that Mr. Derichsweiler was the State's 30(b)(6) witness on several topics and will give some lay testimony at trial. But to the extent that Mr. Derichsweiler is giving expert testimony, Rule 701 is inapplicable.

Bank of China, the plaintiff failed to identify and disclose the witness at issue there -- an individual named Huang -- as an expert by the deadline for disclosing experts. *Bank of China,* 359 F.3d at 182 fn. 12. In fact, the plaintiff in *Bank of China* never identified Huang as an expert at all. *Id.* Despite the fact that Huang had not been identified or proffered as an expert, the *Bank of China* district court admitted his testimony into evidence under Rule 701 as "lay opinions." The Second Circuit found the admission of Huang's testimony under Rule 701 to be in error to the extent that his testimony "reflected specialized knowledge he has because of his extensive experience in international banking . . ." *Id.* at 182.

The Second Circuit determined that Huang's expert testimony could have been admitted under Rule 702 had Huang been disclosed as an expert under Rule 26(a). *Id.* In making this determination, the Court expressly stated that:

> "…although defendants were entitled to *notice,* pursuant to Rule 26(a)(2)(A), that Huang would testify as an expert, they were not entitled to an *expert report* under Rule 26(a)(2)(B)."

Id. at n.13 (emphasis in original). The *Bank of China* Court concluded that Huang would not have been required to provide an expert report because he "was not specially retained to provide expert testimony, and his duties as an employee of Bank of China [did] not regularly include giving expert testimony…" *Id.*

In stark contrast to the facts in *Bank of China,* here, the State notified Defendants on April 1, 2008 -- well in advance of the expert disclosures deadline of May 15, 2008[3] -- that Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler may be called as non-retained experts. Dkt. #2258-2 (4/1/08 Expert Witness Letter at 3-5). And, because these

[3] *See* Court's March 27, 2008 Scheduling Order. Dkt. #1658.

witnesses are non-retained experts, the State was not required to provide expert reports. Therefore, unlike the plaintiff in *Bank of China,* the State has fully complied with the requirements of Rule 26(a). Rule 701 is plainly inapplicable here and, thus, poses no bar to the admissibility of the opinion testimony of Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler.[4]

C. Defendants' Rule 702 Challenge Should Be Disregarded As Untimely

As part of the Motion in Limine, Defendants also seek to exclude the testimony of Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler under Rule 702. *See* Motion in Limine at 7-25. The Court-ordered deadline for "*Daubert*" Motions was May 18, 2009. *See* Dkt. ##2003, 2026, 2049. Defendants filed seven (7) *Daubert* motions by the May 18 deadline, but Defendants did not seek to exclude any of the State's proffered non-retained experts as part of those *Daubert* motions. Instead, Defendants filed the present Motion in Limine on August 5, 2009, well over two (2) months after the *Daubert* motion deadline.

As this Court is well-aware, Fed. R. Evid. 702 imposes upon the trial judge an important "gate-keeping" function with regard to the admissibility of expert opinions. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). In order to determine whether an expert's opinion is admissible, the Court must undergo a

---

[4] Defendants also incorrectly claim that the State has "designated the deposition testimony of these witnesses for use at trial and ha[s] indicated that these gentlemen will not appear live but rather will 'appear' to offer opinion testimony through the generalized opinions and statements elicited by [the State's] counsel during their depositions." Motion at 7. On the contrary, the State has not designated the deposition of Mr. Derichsweiler and has always planned to call him live at trial. Further, while the State designated Dr. Chaubey's deposition as a precaution, the State intends to call Dr. Chaubey live -- if available -- as well. The State has never "indicated" otherwise. In fact, Dr. Chaubey is currently under a subpoena to testify at trial that was served by Defendants themselves.

two-step analysis. First, the Court must determine whether the expert was qualified by "knowledge, skill, experience, training, or education" to render an opinion. *See* Fed. R. Evid. 702. Second, if the expert is so qualified, the Court must determine whether his opinions are "reliable" under the principles set forth under *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

The State understood the Court's *Daubert* motion deadline as the deadline for *any* motion challenging the admissibility of expert testimony under Rule 702. Defendants seemed to understand this too, as they challenged both the qualifications and reliability of certain of the State's retained experts as part of their *Daubert* motions. Defendants raise "*Daubert*" arguments in the present Motion in Limine, only they do not cite to *Daubert. See,* Motion in Limine, *passim.* In essence, the Motion in Limine is a *Daubert* motion in disguise. Defendants had their chance to pose a Rule 702 challenge to Drs. Chaubey, Daniel and Haggard and Mr. Derichsweiler on May 18, 2009. That deadline has come and gone. Defendants should not be permitted to evade the Court's Scheduling Order by raising Rule 702 arguments at this late date. For these reasons, the Motion in Limine should be disregarded as untimely.

D. The Deposition Record Fully Demonstrates the Requisite Qualifications of Drs. Chaubey, Daniel and Haggard

Defendants assert that the deposition record does not establish the requisite qualifications of Drs. Chaubey, Daniel and Haggard[5] to give admission opinion testimony under Rule 702. Motion in Limine at 8-13. Again, the State urges the Court not to indulge Defendants' untimely Rule 702 challenge. However, even if the Court should

[5] Defendants do not challenge the qualifications of Mr. Derichsweiler who will be called live at trial in any event.

consider Defendants' challenge, it will find that the record amply establishes the necessary qualifications of Drs. Chaubey, Daniel and Haggard.

As part of their proposition that the record does not adequately demonstrate the expertise of Drs. Chaubey, Daniel and Haggard, Defendants claim that the State may not rely upon curriculum vitae (c.v.'s) or other biographical documents that were marked as deposition exhibits. However, hearsay is admissible at a *Daubert* hearing and the rules of evidence do not apply. *Daubert,* 509 U.S. at 593 n.10. It follows that in making Rule 702 admissibility decisions, courts may rely upon a c.v. in lieu of testimony on the expert's qualifications. *See, e.g., Cavitat Medical Technologies, Inc. v. Aetna,* 2006 WL 6219350, *2 (D. Colo. April 13, 2006). Thus, because the present Motion involves questions of admissibility under Rule 702, the Court may properly rely upon the c.v.'s and other biographical documents which were marked as deposition exhibits.

1. Dr. Chaubey's Qualifications

Dr. Chaubey's pertinent qualifications are detailed and established in the "Introduction and Background" section of this Response, *supra.* Again, the record establishes that Dr. Chaubey possesses the requisite scientific, technical, or other specialized knowledge, skill, experience, training or education as required by Rule 702. Defendants complain that the State failed to question Dr. Chaubey "fully about his background and experience" and that the State is relying too heavily on his c.v. Motion at 8. As established above, the State elicited ample testimony about Dr. Chaubey's qualifications and marked his c.v. as an exhibit, which is now part of the deposition record. *Id.* If Defendants had any concerns about Dr. Chaubey's qualifications or the State's examination of Dr. Chaubey about his qualifications, they were free to raise those

issues on cross-examination. They failed to do so. Nonetheless, the deposition record reflects that Dr. Chaubey's credentials are excellent and his pertinent expertise in areas such as non-point source pollution, nutrient transport processes and water quality cannot be rationally challenged.

In keeping with this, Defendants' specific "challenge" of Dr. Chaubey's qualifications is narrow and without merit. For example, Defendants claim that Dr. Chaubey's opinions regarding "the transport of constituents of poultry litter relate to his research experience dealing with the transport of such constituents in 'small controlled plots.'" Motion at 10 (quoting Chaubey Depo. at 21). However, Defendants' use of the "small controlled plots" quote is deceptive. Dr. Chaubey's testimony about "small controlled plots" was in reference to a single research project which Dr. Chaubey worked on as part of his Master's thesis. Ex. 1 (Chaubey Depo. at 21). By no means has his research experience been limited to "small controlled plots." The truth of the matter is that Dr. Chaubey has conducted field scale runoff studies under natural conditions in addition to controlled plot studies using simulated rainfall. For instance, in 2008, Dr. Chaubey published a report of a USDA-funded study ("Savoy Study") he conducted involving delineating runoff processes and critical runoff areas in a pasture hillslope of the Ozark Highlands. *Id.* at 133-35; see also Ex. 8 (Savoy Study Report (Depo. Ex. 7)). As part of this Savoy Study, Dr. Chaubey and his team collected rainfall runoff data for every single rain event that took place within that two-year time frame. *Id.* This study involved all natural rainfall events in the sub-watershed within the IRW. *Id.* Defendants' challenge of Dr. Chaubey's qualifications is utterly without merit.

2. Drs. Haggard and Daniel's Qualifications

Dr. Haggard obtained his Ph.D. in biosystem engineering from the Oklahoma State University in the year 2000. Ex. 9 (Haggard Depo. at 11). From 2000 through August 2001, Dr. Haggard worked with the U.S. Geological Survey in Tulsa as a hydrologist conducting water quality analysis. *Id.* at 12. From 2001 through 2006, Dr. Haggard worked as research hydrologist with the USDA. *Id.* at 13. While with the USDA, Dr. Haggard's "main general focus was tackling water quality issues in **northwest Arkansas as related to the poultry industry**." *Id.* (emphasis added). In particular, during his time with the USDA, Dr. Haggard conducted scientific studies to evaluate the effects of land use on chemical concentrations in streams and published the findings of those studies. *Id.* at 13-14. The majority of Dr. Haggard's work involved sampling in streams for nitrogen and phosphorus. *Id.* at 14-15. In 2006, Dr. Haggard took a position as an associate professor at the University of Arkansas and has since been named Director of the Arkansas Water Resources Center. *Id.* at 15. Dr. Haggard has received multiple awards and honors for his research and is widely published, almost exclusively in the area of nutrient-related water quality issues. Ex. 10 (Haggard c.v. (Depo. Ex. 7)).

Defendants claim that the State "fail[ed]" to fully develop the areas of research with which Dr. Haggard has experience, whether through his educational studies, government career, or academic career." Motion at 12. But, aside from the above-described biographical information, which in itself establishes Dr. Haggard's requisite qualifications, the State elicited testimony from Dr. Haggard about several of the specific and pertinent studies he has conducted or been involved in. *See, e.g.* Ex. 9 (Haggard Depo. at 23-30; 51-59; 61-70). As an example, Dr. Haggard testified in detail about a

specific study he participated in within the IRW in order to "evaluate the effect of broiler litter application rate on runoff water quality in response to natural precipitation." Ex. 9 (Haggard Depo. at 22). This study utilized small bermed plots and a runoff "trough" to collect runoff water after natural rain events. Ex. 9 (Haggard Depo. at 22-23). Poultry waste was land applied annually to plots over a three-year period (2003-2006). *Id.* at 25. Ultimately, the results of this study showed that phosphorus concentrations from the plot treated with poultry waste was greater than that from the unamended control plot. *Id.* at 29. The record demonstrates that Dr. Haggard has participated in or conducted numerous studies like this. *See, e.g.,* Ex. 10 (Haggard c.v. (Depo. Ex. 7)). Dr. Haggard has the requisite scientific, technical, or other specialized knowledge, skill, experience, training or education that they have obtained separate and apart from this litigation for the purposes of Rule 702.

With respect to Dr. Daniel, Defendants acknowledge that the record establishes his educational and professional credentials and several specific areas of Dr. Daniel's research, including water quality and runoff, evaluation of edge-of-field runoff and quantification of background levels and the effects of haying and grazing. Motion at 11. Still, Defendants claim that Dr. Daniel offered opinions in areas beyond his expertise, such as manure management, trihalomethane formation at drinking water plants and agricultural economics. *Id.* Dr. Daniel's testimony about "manure management" -- more specifically, regarding phosphorus runoff even when BMPs are implemented -- is a direct quote from one of Dr. Daniel's own peer-reviewed papers. *See* Ex. 11 (Daniel Depo at 52); Ex. 12 (Daniel Depo. Ex. 4 at 322). Further, the testimony about trihalomethane and "agricultural economics" comes directly from another of Dr. Daniel's own peer-reviewed

papers. *Id.* at 88 and 90; Ex. 13 (Daniel Depo. Ex. 7 at 252; 256). As a soil scientist and chemist with many years of experience studying poultry waste runoff and its environmental impacts, Dr. Daniel is qualified to opine on these topics. The fact that Dr. Daniel expressed these opinions in papers that withstood peer review indicates their reliability.

E. The Deposition Record Establishes a Sufficient Factual Foundation for the Opinions Elicited from Drs. Chaubey, Daniel and Haggard

As part of its untimely and inappropriate Rule 702 challenge, Defendants also allege the State "did not develop the factual basis for many of the opinions elicited." Motion at 13. Defendants begin by criticizing the State for purportedly neglecting to ask Dr. Daniel about the methodology he used in conducting the research underlying a paper he published in a May/June 1995 edition of the Journal of Soil and Water Conservation. Motion at 13. However, during his deposition, Dr. Daniel confirmed that he wrote the paper and re-affirmed the validity of many of the findings from the paper, including the finding that land application of poultry waste usually occurs no more than a few miles from where it is produced. Ex. 11 (Daniel Depo. at 45-51). The "methodology" utilized in conducting the underlying research is fully explained in the paper itself. Ex. 12 (Daniel Depo. Ex. 4 at 323-324). And the paper itself is in the deposition record. *Id.* The State was not required to elicit testimony specific to the methodology of each study at issue so long as the methodology is established in the paper itself. Defendants raise no substantive objection as to the methodology expressed in the paper. Thus, their criticism of the State is purely superficial and provides no basis to exclude any of Dr. Daniel's opinions.

As their next example, Defendants assert that the State failed to elicit a factual basis for Dr. Chaubey's opinion that "'[o]nce phosphorus is delivered in the streams, it eventually makes its way downstream.'" Motion at 14 (Chaubey Depo at 69). However, a simple contextual review reveals that this opinion emanated from the final Illinois River mass balance report. Ex. 1 (Chaubey Depo. at 67); Ex. 6 (Chaubey Depo. Ex. 8 at 8). In the report, it provides that "once phosphorus is in the stream, it is not being removed from the stream, except downstream." *Id.* When asked to explain what this means, Dr. Chaubey gave a common sense answer befitting such a common sense concept: "What it means is that once phosphorus is delivered to the stream, it will eventually be transported downstream, and it is not removed by any other mechanism." *Id.* Again, if Defendants were dissatisfied with this explanation, they were free to cross-examine Dr. Chaubey on the subject. They did not. And they provide no basis to preclude Dr. Chaubey from testifying about what should be a non-controversial concept -- that phosphorus flows downstream.

In sum, Defendants' assertion that the deposition record does not provide a sufficient factual basis for the opinions is wholly without merit.

F. The Deposition Record Establishes That the Opinions of the Non-Retained Experts Are Sufficient to the Facts of the Case

Defendants admit, as they must, that "Drs. Chaubey, Haggard, and Daniel have performed tests and studies in the IRW generally." Motion at 16. But, Defendants apparently do not feel that the extensive and highly relevant research conducted by these experts in the IRW is sufficient because "their tests involve different time frames and different portions of the IRW than work performed in this case by [the State's] retained experts." *Id.* Defendants further criticize the fact that Dr. Chaubey was not asked to

form opinions specific to this case. *Id.* Of course, had the State asked Dr. Chaubey to form opinions specifically in connection with this litigation, he would no longer be a non-retained expert, would have to submit an expert report and lose the absolute neutrality that makes him such a powerful witness. In any event, as shown throughout this Response, Dr. Chaubey's extensive study of non-point pollution, nutrient transport and water quality in the IRW and beyond is more than sufficiently tied to the issues in this case to be helpful to the trier of fact. *See Daubert,* 509 U.S. at 591.

As for the "different time frames" issue, Defendants are particularly critical of the studies conducted by these experts in the 1990s. But these studies are relevant in many respects. First, the State's watershed modeling work includes data that goes as far back as the 1950s, so 1990s data is relevant in that respect. Second, studies showing water quality problems in the IRW associated with poultry waste are pertinent to the issue of what Defendants knew or whether they should have known of the problem which is important in establishing liability under Restatement (Second) §427, determining penalties under 27A Okla. Stat. § 2-3-504(H) and proving intent for purposes of precluding any alleged contributory fault. Third, because nutrient transport processes such as surface water runoff are universal and do not change, studies on such issues from the 1990s remain pertinent in the present.

Similarly, as touched on in the Introduction and Background section, *supra*, studies from other watersheds can be relevant. As Dr. Daniel testified, the loss of phosphorus in agricultural runoff is a concern in any area in the United States where there are confined animal feeding operations such as "the Bosque River, certainly in northwest Arkansas, Georgia, Alabama, Delmarva Peninsula." Ex. 11 (Daniel Depo. at 81). As Dr.

Chaubey explained at length, his Beaver Lake (which abuts the IRW) study is helpful in evaluating the IRW because the nutrient runoff processes are similar. Ex. 1 (Chaubey Depo. at 245-48). Additionally, Dr. Chaubey did not testify that he would offer opinions "specific to the entire IRW, but rather other watersheds that may be similar . . ." as Defendants assert. Motion at 16. As explained in detail throughout this Response, Dr. Chaubey has done a significant amount of work specific to the IRW, is very familiar with the IRW and has offered many well-supported opinions specific to the IRW.

Specifically, with respect to Mr. Derichsweiler, Defendants argue that to the extent he relies upon a "Clean Lakes study" conducted by the Oklahoma Water Resources Board, his opinions do not satisfy Rule 702. Motion at 19. Defendants claim that there is "no testimony supporting [the Clean Lake study's] relevance," but this is not true. *Id.* Mr. Derichsweiler testified that the Clean Lakes study is the first study he is aware of that identified elevated levels of phosphorus as a problem in Lake Tenkiller. Ex. 14 (8/8/08 Derichsweiler Depo. at 47). Such historic data is relevant in the modeling of the Lake and in generally assessing the progression of the environmental injuries. Defendants have provided the Court with no basis to preclude Mr. Derichsweiler from offering opinion testimony under Rule 702.

G. Mr. Derichsweiler's Opinion Testimony is Not Cumulative

Lastly, Defendants also claim that Mr. Derichsweiler's testimony should be precluded as being cumulative. Motion at 19; 22-4. Particularly, it is Defendants' mistaken position that Mr. Derichsweiler offers no opinion which is not cumulative of two other experts designated by the State, Dr. Dan Storm and Dr. Bernie Engel. *Id.* As an initial matter, this argument is premature and not properly brought in a motion in

limine. For instance, at trial the State could decide to call Mr. Derichsweiler to testify before Drs. Storm and Engel. At that point, Mr. Derichsweiler's testimony could not be cumulative.

In any event, Mr. Derichsweiler brings a unique perspective to the case that is not could not be cumulative of any other witness. Indeed, from his distinctive position, Mr. Derichsweiler has access to a wealth of water quality data collected in the IRW. Specifically, Mr. Derichsweiler is an engineering manager with the Oklahoma Department of Environmental Quality ("ODEQ") and supervisor for the watershed planning and storm water permitting section. Ex. 14 (8/8/08 Derichsweiler Depo. at 7). Most importantly, Mr. Derichsweiler's section is responsible for compiling the results of water quality monitoring and the assessments of water quality data compared against Water Quality Standards to identify "impaired waters" of the State. *Id.* at 10. These "impaired waters" are then placed on the "303(d) list" which is biannually submitted to the EPA. *Id.* It is called the 303(d) list because it is required by § 303(d) of the Clean Water Act. *Id.* at 11. In particular, where the ODEQ's water sampling data from a water body show that applicable water quality standards have been violated, that water body is placed on Oklahoma's 303(d) list. *Id.* The current 303(d) shows that various segments of IRW water bodies are impaired with respect to phosphorus and pathogenic bacteria. Mr. Derichsweiler has also been very involved in the Oklahoma's effort to develop a Total Daily Maximum Load ("TMDL") in the IRW and has expertise in the area of watershed modeling. Mr. Derichsweiler's opinion testimony is relevant, not cumulative and will assist the trier of fact.

Respectfully submitted,

W.A. Drew Edmondson, OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch, OBA #17067
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs, OBA #7583
Joseph P. Lennart, OBA #5371
Richard T. Garren, OBA #3253
Sharon K. Weaver, OBA #19010
Robert A. Nance, OBA #6581
D. Sharon Gentry, OBA #15641
David P. Page, OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

/s/ Robert M. Blakemore
Louis W. Bullock, OBA #1305
Robert M. Blakemore, OBA #18656
BULLOCK BULLOCK & BLAKEMORE
110 West 7th Street, Suite 707
Tulsa, OK 74119-1031
(918) 584-2001

Frederick C. Baker (*pro hac vice*)
Elizabeth C. Ward (*pro hac vice*)
Elizabeth Claire Xidis (*pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold (*pro hac vice*)
Ingrid L. Moll (*pro hac vice)*
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent (*pro hac vice)*
Michael G. Rousseau (*pro hac vice)*
Fidelma L. Fitzpatrick (*pro hac vice)*
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

ATTORNEYS FOR PLAINTIFF, STATE OF OKLAHOMA

CERTIFICATE OF SERVICE

I certify that on the 20th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W.A. Drew Edmondson, Attorney General — fc_docket@oag.ok.gov
Kelly Hunter Burch, Assistant Atty General — kelly.burch@oag.ok.gov
OFFICE OF THE ATTORNEY GENERAL , STATE OF OKLAHOMA

M. David Riggs — driggs@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert A. Nance — rnance@riggsabney.com
D. Sharon Gentry — sgentry@riggsabney.com
David P. Page — dpage@riggsabney.com
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

Louis W. Bullock — lbullock@bullock-blakemore.com
Robert M. Blakemore — bblakemore@bullock-blakemore.com
BULLOCK BULLOCK & BLAKEMORE

Frederick C. Baker — fbaker@motleyrice.com
William H. Narwold — bnarwold@motleyrice.com
Elizabeth C. (Liza) Ward — lward@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Ingrid L. Moll — imoll@motleyrice.com
Jonathan D. Orent — jorent@motleyrice.com
Michael G. Rousseau — mrousseau@motleyrice.com
Fidelma L. Fitzpatrick — ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
COUNSEL FOR PLAINTIFF, STATE OF OKLAHOMA

William D. Perrine — wperrine@pmrlaw.net

Robert P. Redemann rredemann@pmrlaw.net
David C. Senger david@cgmlawok.com
PERRINE, McGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
YOUNG WILLIAMS
COUNSEL FOR DEFENDANT CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

John H. Tucker jtucker@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry W. West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Melissa C. Collins mcollins@faegre.com
Colin C. Deihl cdeihl@faegre.com
Randall E. Kahnke rkahnke@faegre.com
FAEGRE & BENSON LLP
COUNSEL FOR DEFENDANT CARGILL, INC. and CARGILL TURKEY PRODUCTION, LLC

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K.C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick bchadick@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
BASSETT LAW FIRM
COUNSEL FOR DEFENDANT GEORGE'S INC. AND GEORGE'S FARMS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip D. Hixon phixon@mhla-law.com
Craig A. Mirkes cmirkes@mhla-law.com
McDANIEL HIXON LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR DEFENDANT PETERSON FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
COUNSEL FOR DEFENDANT SIMMONS FOODS, INC.

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
TYSON FOODS INC

Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
Dustin Darst dustin.darst@kutakrock.com
KUTAK ROCK LLP

Stephen Jantzen sjantzen@ryanwhaley.com
Paula Buchwald pbuchwald@ryanwhaley.com
Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY & COLDIRON

Thomas C. Green tcgreen@sidley.com
Mark D. Hopson mhopson@sidley.com
Timothy Webster twebster@sidley.com
Jay T. Jorgensen jjorgensen@sidley.com
Gordon D. Todd gtodd@sidley.com
Erik J. Ives eives@sidley.com
SIDLEY AUSTIN LLP
COUNSEL FOR DEFENDANTS TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., and COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Jennifer S. Griffin jgriffin@lathropgage.com
David Brown dbrown@lathropgage.com
Frank M. Evans III fevans@lathropgage.com
LATHROP & GAGE, L.C.
COUNSEL FOR DEFENDANT WILLOW BROOK FOODS, INC.

Robin S. Conrad rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER

Gary S. Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
COUNSEL FOR US CHAMBER OF COMMERCE AND AMERICAN TORT REFORM ASSOCIATION

D. Kenyon Williams, jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
COUNSEL FOR POULTRY GROWERS / INTERESTED PARTIES / POULTRY PARTNERS, INC.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevey.com
CROWE & DUNLEVY
COUNSEL FOR OKLAHOMA FARM BUREAU, INC.

Kendra A. Jones, Assistant Attorney General kendra.jones@arkansasag.gov
Charles L. Moulton, Sr. Ass't AG charles.moulton@arkansasag.gov
OFFICE OF THE ATTORNEY GENERAL, STATE OF ARKANSAS
COUNSEL FOR STATE OF ARKANSAS

Mia Vahlberg mvahlberg@gablelaw.com
GABLE GOTWALS

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
HOGAN & HARTSON
COUNSEL FOR NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASS'N AND NATIONAL TURKEY FEDERATION

John D. Russell jrussell@fellerssnider.com
William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
FELLERS SNIDER BLANKENSHIP BAILEY & TIPPENS P.C.
COUNSEL FOR ARKANSAS FARM BUREAU FEDERATION

Barry G. Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
TITUS HILLIS REYNOLDS LOVE DICKMAN & McCALMON

William S. Cox III wcox@lightfootlaw.com
Nikaa B. Jordan njordan@lightfootlaw.com
LIGHTFOOT FRANKLIN & WHITE LLC
COUNSEL FOR AMERICAN FARM BUREAU FEDERATION and NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AMICUS CURIAE

Richard Mullins richard.mullins@mcafeetaft.com

McAFEE & TAFT PC
COUNSEL FOR TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSN, TEXAS PORK PRODUCERS ASSN, AND TEXAS ASSN OF DAIRYMEN

/s/ Robert M. Blakemore
Robert M. Blakemore